Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER, TERM 1975

No. 75-300

PAUL DAVID NOVICK; ALAN HAIM;
and UNIQUE SPECIALTIES, INC.,

*Petitioners,*

*vs.*

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
LOUISIANA; BEN C. DAWKINS, JR.,
Senior Judge; and UNITED
STATES OF AMERICA,

*Respondents.*

**MOTION FOR LEAVE TO FILE PETITION**
**FOR WRITS OF MANDATE AND PROHIBITION**
**AND**
**PETITION FOR**
**WRITS OF MANDATE AND PROHIBITION**

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## MOTION FOR LEAVE TO FILE PETITION FOR WRITS OF MANDATE AND PROHIBITION

Petitioners respectfully move for leave to file the annexed petition for writs of mandate and prohibition.

The issue presented by this case is one of first impression involving the administration of criminal justice throughout the United States. Specifically, the question presented is whether, in light of this Court's obscenity decision in Hamling v. United States,

418 U.S. 87 (1974), which emphasized the role of the jury in obscenity cases and which rejected national standards and applied "local standards," defendants in such cases are entitled to seek changes of venue.

Respondents, the United States District Court for the Western District of Louisiana and its Senior Judge, the Honorable Ben C. Dawkins, Jr., have ruled that venue may not be changed. The basis for respondents' decision is an erroneous decision of the District Court for the Central District of California, U.S. v. Elkins, No. CR 74-1828, ___ F.Supp. ___ (C.D. Cal., May 22, 1975), which dismissed an obscenity case transferred to it from the Northern District of Iowa. The opinion of the Northern District of Iowa transferring the Elkins case to California is reprinted in Appendix A to the Petition. In ordering the transfer, the Northern District of Iowa held, based on Hamling v. U.S., supra, that the Iowa community standard would govern the trial in California. The Central District of California, however, interpreted Hamling v. U.S. as preventing the California jury from applying the Iowa standard. The opinion of the Central District, for which publication has been sought, is reprinted in Appendix B to the Petition. Thus, two districts in the same case came to the opposite conclusion with respect to the same issue. The Government chose not to appeal the California dismissal because the erroneous rule announced therein permits it to argue, so far successfully, that no case should ever



be transferred to California because it will be dismissed as was the Elkins case. The defendants in Elkins could not appeal because ostensibly the decision ordering dismissal was in their favor. Thus, the decision of the Central District of California sits, unreviewable by any court except this one.

Petitioners herein are compelled to seek relief in this Court instead of the United States Court of Appeals for the Fifth Circuit because this case really involves review of an erroneous decision of the Central District of California which cannot be affected by any ruling made by the Fifth Circuit. District courts are not controlled by decisions from other circuits. See Johnson v. Associates Finance, Inc., 365 F.Supp. 1380 (D.C. Ill. 1973) (D.C. Ill. not bound by 9th Circuit); In re Etherton, 88 F.Supp. 874 (D.C. Cal. 1950) (D.C. Cal. not bound by 2nd Circuit); U.S. v. San Diego Grower's Ass'n., Inc., 177 F.Supp. 607 (S.D. Cal. 1959) (Southern District of Calif. not bound by 10th Circuit).

This Court should exercise its discretion and consider the issue raised herein because it presents a pure legal issue; because the problem was created by the ambiguous opinion of this Court in Hamling v. U.S., supra; and because the problem is confronting numerous district courts throughout the land. See, e.g., U.S. v. Gold, CR 74-99, Western District of Louisiana; U.S. v. Ginsburg, CR 75-300, Central District of California (dismissed

by Government in light of Elkins decision, after transfer from District of New Hampshire); U.S. v. Germain and Kane, CR 74-1029, Central District of California (transferred to California from Southern District of Ohio and then dismissed by Government over defendants' objections; defendants were then reindicted in Ohio, CR 274-113); U.S. v. Spinar and Johnson, CR 74-1028, Central District of California (transferred to California from Southern District of Ohio and then dismissed by Government over defendants' objections; defendants were then reindicted in Ohio, CR 74-114). Doubtless there are other cases with which petitioners are not familiar.

If this Court does not review this matter, the decision of the Central District of California in U.S. v. Elkins, supra, which the defendants therein could not appeal because it resulted in a dismissal and which the Government chose not to appeal in order to be able to use it in other obscenity cases to block transfer, such as in the instant case, will continue to be unreviewed.

This Court has jurisdiction to entertain this proceeding by virtue of 28 U.S.C. Section 1651(a) (all writs act) and Rule 31 of the United States Supreme Court Rules. See also Platt v. Minnesota Mining and Mfg. Co., 376 U.S. 240 (1963).

In conclusion, petitioners respectfully move for leave to file the



annexed Petition.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
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## PETITION FOR

## WRITS OF MANDATE AND PROHIBITION

Petitioners pray that a writ of mandate issue to compel respondents United States District Court for the Western District of Louisiana and Ben C. Dawkins, Jr., Senior Judge, to pass upon their motions for change of venue and reconsider the orders denying their motions for change of venue without

regard to the decision of the United States District Court for the Central District of California in U.S. v. Elkins, No. CR 74-1828 (C.D. Cal., May 22, 1975) ___F.Supp. ___, and that a writ of prohibition issue restraining respondents from trying petitioners in the United States District Court for the Western District of Louisiana without first having reconsidered petitioners' motions for change of venue and the rulings thereon.

## OPINIONS BELOW

The unreported August 6, 1975 order of the Honorable Ben C. Dawkins, Jr., Senior Judge, denying petitioner Novick's motion for change of venue is reprinted in Appendix C. The unreported August 11, 1975 order of the Honorable Ben C. Dawkins, Jr., Senior Judge, denying petitioner Haim's motion for change of venue is reprinted in Appendix D.

The opinion of the Central District of California in U.S. v. Elkins, No. CR 74-1828 (C.D. Cal., May 22, 1975) is expected to be published soon in the Federal Supplement. It was the sole basis for Judge Dawkins' ruling in the instant case. It is reprinted in Appendix B.

The initial order of the Northern District of Iowa in U.S. v. Elkins, CR 74-4015 (December 6, 1974) transferring the case to the Central District of California is unreported but reprinted



in Appendix A.

## JURISDICTION

This Court's jurisdiction is based upon 28 U.S.C. Section 1651(a), Rule 31 of the United States Supreme Court Rules, and Platt v. Minnesota Mining & Mfg. Co., 376 U.S. 240 (1963).

## QUESTIONS PRESENTED

1. Are defendants in obscenity cases where the alleged obscene matter is mailed from their home district to another district and where they are indicted in the district wherein the matter is received automatically barred from seeking a change of venue by virtue of Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed 2d 419 (1973) and Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed 2d 590 (1974)?

2. Does the sender of allegedly obscene matter have a constitutional right under Article 3, Section 2, Clause 3 of the United States Constitution and the First, Fifth and Sixth Amendments to be tried in his home district instead of the district wherein the material is received?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article 3, Section 2, Clause 3 of the United States Constitution and the First, Fifth and Sixth Amendments thereto. It also involves 18 U.S.C. Section 1461, 18 U.S.C. Section 3237 and Rules 21(b) and 22 of the Federal Rules of Criminal Procedure. Finally, jurisdiction is conferred on this Court by virtue of 28 U.S.C. Section 1651(a) and Rule 31 of the United States Supreme Court Rules.

1. Article 3, Section 2, Clause 3 of the United States Constitution:

> "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed."

2. The First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the



> Government for a redress of grievances."

3. The Fifth Amendment:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

4. The Sixth Amendment:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

5. Title 18, United States Code, Section 1461:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and -
>
> Every article or thing designed, adapted, or intended for producing abortion, or for any indecent or immoral use; and

"Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion, or for any indecent or immoral purpose; and

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means abortion may be produced, whether sealed or unsealed; and

Every paper, writing, advertisement, or representation that any article instrument, substance, drug, medicine, or thing may, or can, be used or applied for producing abortion, or for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medidine, or thing -



"Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section or section 3001(e) of title 39 to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

The term 'indecent' as used in this section includes matter of a character tending to incite arson, murder, or assassination."

6. Title 18, United States Code, Section 3237:

"(a) Except as otherwise

expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves.

(b) Notwithstanding subsection (a), where an offense is described in section 7203 of the Internal Revenue Code of 1954, or where an offense involves use of the mails and is an offense described in section 7201 or 7206(a), (2), or (5) of such Code (whether or not the offense is also described in another provision of law), and prosecution is begun in a judicial district other than the judicial district in which the defendant resides, he may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged



offense was committed: Provided, That the motion is filed within twenty days after arraignment of the defendant upon indictment or information."

7. Rule 21(b) of Federal Rules of Criminal Procedure:

"(b) Transfer in Other Cases. For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the counts thereof to another district."

8. Rule 22 of Federal Rules of Criminal Procedure:

"A motion to transfer under these rules may be made at or before arraignment or at such other time as the court or these rules may prescribe."

9. Title 28, United States Code, Section 1651(a):

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

10. Rule 31 of Supreme Court Rules:

"1. The petition in any proceeding seeking the issuance of a writ by this court authorized by 28 U.S.C. Sec. 1651(a) or 28 U.S.C. Sec. 2241 shall be prefaced by a motion for leave to file such petition, and both shall be printed. All contentions in support of the petition shall be included in the petition. The case will be placed upon the docket when forty copies of the printed papers, with proof of service as prescribed by Rule 33 (subject to paragraph 5 of this rule), are filed with the clerk and the docket fee is paid. The appearance of counsel for the petitioner must be entered at this time.

2. If the petition seeks issuance of a common law writ of certiorari under 28 U.S.C. Sec. 1651(a), there may also be filed, at the time of docketing, a certified copy of the record, including all proceedings in the court to which the writ is sought to be directed. However, the filing of such record is not required. The petition shall, except for the addition of the motion for leave to file, follow as far as may be the form for a petition for certiorari prescribed by Rule 23, and shall set forth with particularity why the relief sought is not available in anyother court, or cannot



be had through other appellate processes. The respondent may, within thirty days after receipt of the motion and petition, file forty printed copies of a brief in opposition, as provided in Rule 24.

3. If the petition seeks issuance of a writ of prohibition, a writ of mandamus, or both in the alternative, it shall set forth with particularity why the relief sought is not available in any other court, and there shall be appended to such petition a copy of the judgment or order in respect of which the writ is sought, including a copy of any opinion rendered in that connection, and such other papers as may be essential to an understanding of the petition. The petition shall follow, insofar as applicable, the form for the petition for writ of certiorari prescribed by Rule 23. The motion and petition shall be served on the judge or judges to whom the writ is sought to be directed, and shall also be served on every other party to the proceeding in respect of which relief is desired. The judge or judges, and the other parties, may, within thirty days after receipt of the motion and petition, file forty printed copies of a brief or briefs in opposition thereto, with proof of service. If the judge or judges concerned do not desire to contest the motion and petition,

they may so advise the clerk and all parties by letter. All parties, other than the judge or judges, who are served pursuant to this paragraph, shall also be deemed to be respondents for all purposes in the proceeding in this court.

4. When briefs in opposition under paragraphs 2 and 3 of this rule have been filed, or when the time within which they may be filed has expired, or upon an express waiver of the right to file, the motion, petition, and briefs shall be distributed to to the court by the clerk.

5. If the petition seeks issuance of an original writ of habeas corpus, it shall comply with the requirements of 28 U.S.C. Sec. 2242, and in particular with the last paragraph thereof; and, if the relief sought is from the judgment of a state court, shall specifically set forth how and wherein the petitioner has exhausted his remedies in the state courts. See Ex parte Abernathy, 320 U.S. 219; Ex parte Hawk, 321 U.S. 114. Proceedings under this paragraph will be ex parte, unless the court requires the respondent to show cause why leave to file the petition for a writ of habeas corpus should not be granted. Neither refusal of leave to file, without more, nor an order of transfer under authority of 28 U.S.C. Sec. 2241(b),



is an adjudication on the merits, and the former action is to be taken as without prejudice to a further application to any other court for the relief sought.

6. If the court orders the cause set down for argument, the clerk will notify the parties whether additional briefs are required, when they must be filed, how much time has been allotted for oral argument, and, if the case involves a petition for common law certiorari, that the parties shall proceed to print an appendix pursuant to Rule 36."

## STATEMENT OF THE CASE

On June 19, 1975 a six-count indictment was returned by a grand jury of the United States District Court for the Western District of Louisiana, Monroe Division, alleging that petitioners violated Title 18, United States Code, Section 1461 by mailing from the Central District of California to the Western District of Louisiana certain obscene matter. The matter was allegedly mailed on October 2, 1974, December 17, 1974, and April 9, 1975.

Petitioners Novick and Haim reside in the Central District of California and Novick's company, Unique Specialties, Inc., also a petitioner herein, is located within

the Central District of California.

Prior to their scheduled arraignment in the Western District of Louisiana, petitioners, in propria persona, filed motions to change venue pursuant to Rules 21(b) and 22 of the Federal Rules of Criminal Procedure. In their motions, supported by affidavits, petitioners contended that "for the convenience of parties and witnesses and in the interest of justice" the case should be transferred to the Central District of California. Among other things, petitioners filed affidavits setting forth the fact that they had never been to Louisiana and did not know its "community standard" regarding obscenity. Their affidavits supported their contentions under Rule 21(b).

The Government filed opposition memoranda contending, among other things, that the case should not be transferred to the Central District of California because it would be dismissed there, citing U.S. v. Elkins, No. CR 74-1828 (C.D. Cal., May 23, 1975) (reprinted in Appendix B). The Government relied heavily on the Elkins decision, stating,

> "That decision is now stare decisis in the Central Ditrict of California and has not been appealed. The United States submits, herein, that the decision of the District Court in Elkins is correct. Accordingly there is but one district in which this particular case may be tried, and that



> district is the Western District of Louisiana. If transferred to the Central District of California, it is no doubt that dismissal will occur." (Memorandum in Support of Government's Response to Defendants' Motion For Change of Venue, pp. 3-4).

On August 6 and 11, 1975, the United States District Court for the Western District of Louisiana, accepting the Government's argument, ruled,

> "In light of the ruling in United States of America vs. Robert Elkins, No. CR. 74-1828 (C.D. Cal., May 23, 1975), (Crary, J.), rendered by the United States District Court for that District, and the authorities therein cited, the motion by defendant[s] . . . for change of venue is hereby DENIED."

This was the sole basis for the court's ruling. The court's orders are reprinted in Appendices C and D.

On August 15, 1975, petitioners were arraigned in the Western District of Louisiana before the Honorable Ben C. Dawkins, Jr. Petitioners' request to set the trial after this Court would have an opportunity to consider the motion and instant petition was denied, and the matter was set down

for trial October 6, 1975. Petitioners offered to waive time and do hereby waive their right to a speedy trial in order to permit this Court to act upon the motion and petition. The court appointed attorneys for petitioners.

## RELIEF SOUGHT IS NOT AVAILABLE IN ANY OTHER COURT

This case really involves the validity of the decision of the Central District of California in U.S. v. Elkins, supra, which is contrary to the order of the Northern District of Iowa which originally transferred the case to California. The Government was the only party which could have appealed the Elkins decision since it resulted in a dismissal of the indictment. As the Government frankly conceded in the court below, it is pleased with the Elkins decision because it effectively forecloses venue changes in obscenity cases.

Petitioners cannot obtain relief in the Fifth Circuit because that Circuit cannot overrule the Central District of California. See authorities cited in the accompanying motion.

Mandamus is available to pass upon purely legal issues, and this case surely raises one involving district courts throughout the nation. This



Court's decision in Hamling v. U.S., supra, led two districts in the same case to come to opposite conclusions regarding the precise issue raised herein. Petitioners cannot imagine a more compelling case crying for this Court's immediate resolution. This Court has always afforded cases dealing with the First Amendment special consideration. See Roaden v. Kentucky, 413 U.S. 496, 504 (1973).

The Government's refusal to appeal the Elkins case to the Ninth Circuit, despite Elkins' request that it do so, should not insulate the Elkins decision from judicial review.

Petitioners do not have any other adequate remedy. They have already stated under oath that they cannot afford to defend themselves in Louisiana. Their court appointed attorneys are not experienced in obscenity cases. They cannot afford to transport witnesses to Louisiana. In short, trial in Louisiana will cause them hardships which may still be beyond appellate review from a judgment of conviction. The Fifth Circuit, on appeal, will no doubt feel compelled to defer to the Elkins decision, as did the court below. At a minimum, the court below should pass upon petitioners' venue motions and consider the facts presented therein instead of automatically foreclosing such consideration because of the Elkins decision.

Of course, should petitioners be acquitted, no appellate review would be

available, and the issue would continue to go unresolved.

REASONS FOR GRANTING THE WRIT

A. THE CASE PRESENTS QUESTIONS CONCERNING CONSTITUTIONAL LAW AND THE ADMINISTRATION OF CRIMINAL JUSTICE IN THE FEDERAL COURTS RELATING TO FUNDAMENTAL RIGHTS PROTECTED BY THE FIRST AMENDMENT.

Simply stated, has this Court in Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed 2d 590 (1974) barred venue motions in obscenity cases because of its emphasis on the role of the jury and its rejection of a national standard in favor of a local standard? The Northern District of Iowa in U.S. v. Elkins, No. CR 74-4015 (Dec. 6, 1974) has said no, and the Central District of California, in the same case, U.S. v. Elkins, No. 74-1828 (May 22, 1975) has said yes. There is no exception in Rule 21(b) for obscenity cases, yet the Central District of California has read an exception into the Rule. Because two different districts in the same case have arrived at the opposite conclusion on the same issue, because no other court can resolve the matter, because the problem is a recurring one in numerous districts, because there is no way to obtain direct review of the California Elkins decision, because the problem was created by this Court in Hamling v. U.S., supra, and because the First Amendment is involved, this Court should



grant the writ to resolve the issue. Petitioners believe the Central District of California erred. Their right to venue consideration under Rule 21(b) has been denied by the court below.

B. THE DECISION BELOW VIOLATES PETITIONERS' RIGHTS UNDER ARTICLE 3, SECTION 2, CLAUSE 3 OF THE CONSTITUTION, AND THE FIRST, FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The argument made herein was made in the Western District of Louisiana.

Article 3, Section 2, Clause 3 of the Constitution generally provides that criminal trials be held in the state wherein the crimes shall have been committed. The Sixth Amendment also reflects the strong policy in favor of local trials. Insofar as Title 18, United States Code, Section 3237 may be construed as permitting a trial in the Western District of Louisiana, petitioners respectfully submit the statute violates Article 3, Section 2, Clause 3 and the Sixth Amendment. Moreover, insofar as subparagraph (b) of Section 3237 restricts transfers to defendants in tax cases it constitutes a denial of equal protection with respect to defendants in nontax cases. The equal protection principles enunciated herein can be found in the Fifth Amendment. See Bolling v. Sharpe, 347 U.S. 497 (1954).

Because of the strong First Amendment principles involved herein and because of the importance of notice in due process, see Cramp v. Board of Public Instruction, 368 U.S. 278 (1961), and in view of this Court's adoption of the local standard in obscenity cases, it would be a violation of First Amendment principles as well as Fifth Amendment due process for petitioners to be tried in a district whose standards were not known by them and could not reasonably be ascertained (because of the size of the country).

## CONCLUSION

For the foregoing reasons, this petition should be granted to review the decision of the United States District Court for the Western District of Louisiana.

Respectfully submitted,

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## APPENDIX A

### ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, WESTERN DIVISION DECEMBER 6, 1974

IN THE UNITED STATES DISTRICT

COURT FOR THE NORTHERN DISTRICT OF

IOWA, WESTERN DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, Plaintiff, | ) | No. CR 74-4015 |
| vs. | ) | ORDER |
| ROBERT ELKINS, et al., Defendants. | ) | |

(Filed December 6, 1974)

This matter is before the court upon the defendants' resisted motions for change of venue and various other resisted motions.

It is the court's view that the defendants' motions for change of venue should be granted and decision on the remaining motions is properly to be reserved for the court which will eventually try this case.

FRCrP 21(b) provides in part that

> For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him . . . to another district.

The convenience problems in this case loom large. All defendants and apparently all witnesses whose testimony cannot be stipulated reside in California. From the affidavits submitted by defendants and their attorneys, it appears that the hardships in terms of financial, employment and health problems which defendants would be subjected to by trial in this District are substantial. Inconvenience of a lesser degree would also be occasioned to all trial witnesses by the necessity to travel some 2,000 miles to testify. The convenience of the government is served equally well whether trial is had in Iowa or California since it has adequate prosecutorial resources in both locations.

The major argument in opposition to transfer is that under Miller v. California, 413 U.S. 15 (1973), the requirement that allegedly obscene materials be judged by contemporary community standards requires application of the standards of the state or locale where distribution of the materials occurred, rather than "hypothetical and unascertainable" national standards



previously thought applicable under Memoirs v. Massachusetts, 383 U.S. 413 (1966). Against this proposition, defendants' objection that they were unable to ascertain contemporary community standards where the challenged materials were disseminated is unavailing. Defendants must have known that the items they distributed were arguably obscene and they certainly knew where distribution occurred. Thus, it was incumbent upon defendants to make a reasonable attempt to ascertain the standards of the area to which their materials were sent, or run the risk of prosecution. Any other view of this issue would permit the studied ignorance of a pornographer located on New York City's 42nd Street of all non-local standards to provide absolute insulation from prosecution for distribution of materials patently offensive to the standards of the communities in which distribution occurs. In Roth v. United States, 354 U.S. 476 (1957), the Court held that 18 USC Sec. 1461, when "applied according to the proper standard for judging obscenity, do[es] not offend constitutional safeguards . . . or fail to give . . . adequate notice of what is prohibited." The same must be true for Sec. 1462, and defendants' contention that they have been deprived of the notice aspect of due process must fail.

However, it is not necessary to the application of community standards found in northwest Iowa that the trial be had in this District. In Hamling v. United States, ___ U.S. ___ (June 24, 1974), the Court said that simply because a trial

is held in a certain District, it does not follow that the trial "Court would not be at liberty to admit evidence of standards existing in some place outside of [the trial] district, if it felt such evidence would assist the jury in the resolution of the issues which they [must] decide." Thus under Miller it is not necessary that the relevant community standards be applied by a jury from the same community. Upon motion by the prosecution, evidence may be received in the Central District of California as to the contemporary community standards of the affected areas of Iowa. This avoids the problem which would arise were defendants only to be judged according to the standards of the place of trial.

In view of the hardship and inconvenience to defendants and witnesses from trial in Iowa and the admissibility of Iowa community standards in a California federal court, both convenience of the parties and witnesses and the interests of justice require a change of venue in this case.[1/] Platt v. Minnesota Mining and Mfg. Co., 376 U.S. 240 (1963); Jones v. Gasch, 404 F. 2d 1231 (CA D.C. 1967). See also 8 Moore's Fed. Prac. Sec. 21.04[1] et seq.

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1/ While the issue of docket congestion in the transferee district has not been raised by the government, if such does in fact exist, the transferor judge upon request is available to try the case promptly in the Central District of California.



It is therefore

ORDERED

Motion for change of venue to the Central District of California, granted; the Clerk shall forthwith forward the files in this matter to the Clerk of the U.S. District Court for the Central District of California.

December 6, 1974.

/s/ Edward J. McManus
Edward J. McManus, Chief
Judge UNITED STATES DISTRICT
COURT

APPENDIX B

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MEMORANDUM OPINION AND ORDER OF DISMISSAL OF THE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA

MAY 22, 1975

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | No. |
| | ) | |
| Plaintiff, | ) | CR 74- |
| | ) | 1828 |
| vs. | ) | |
| | ) | |
| ROBERT ELKINS, | ) | |
| HOWARD K. COHEN, | ) | |
| RICHARD J. ARONSON, | ) | |
| STEPHEN R. GINSBURG, | ) | |
| ANGELO M. GIUDICE, and | ) | |
| DANIEL GOLDBLUM, aka DANNY GOLD, | ) | |
| all doing business as | ) | |
| HOLLYWOOD LTD., | ) | |
| METROPOLITAN MERCANTILE, and | ) | |
| PRECISION FITTINGS, | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |

(Filed May 22, 1975)

MEMORANDUM OPINION AND ORDER OF DISMISSAL

The Indictment in the within action



was filed in the Northern District of Iowa and charges the defendants with conspiracy to cause to be delivered by mail certain nonmailable, obscene and lewd advertisements, motion picture films, and information as to the obtaining of said material, and using common carriers to carry said material in interstate commerce, in violation of Sections 1461 and 1462, Title 18, United States Code.

The case was transferred to this District from the Northern District of Iowa by order for change of venue for the convenience of parties and witnesses. After ruling that the contemporay standards, as to obscenity, of the Northern District of Iowa, the area of the distribution of the material, should be applied, the Iowa Court concluded that under Miller v. California, 413 U.S. 15 (1973), "it is not necessary to the application of community standards found in northwest Iowa that trial be had in this District. In Hamling v. United States, 418 U.S. 87 (June 24, 1974), the Court said that simply because a trial is held in a certain District, it does not follow that the trial 'Court would not be at liberty to admit evidence of standards existing in some place outside of [the trial] district, if it felt such evidence would assist the jury in the resolution of the issues which they [must] decide.' Thus under Miller it is not necessary that the relevant community standards be applied by a jury from the same community. Upon motion by the prosecution, evidence may be received in the Central District of California as to

the contemporary community standards of the affected areas of Iowa. This avoids the problem which would arise were defendants only to be judged according to the standards of the place of trial."

The Government opposed the defendants' motion for change of venue, and prior to trial in this District moved for an evidentiary ruling as to whether the contemporary community standards in the Northern District of Iowa, as opposed to the standards in this District, would be the standards applied in the trial of the case. By written order filed May 19, 1975, this Court ruled that only evidence as to the contemporary community standards for the Northern District of Iowa would be admitted as to this issue. It was further ordered that the Iowa community standards could not be proven solely by expert testimony, since expert testimony is admissible only to assist a jury in determining standards outside the District of trial.

The Court concludes that an attempt by the Government to prove its case in this forum solely by expert testimony would not provide a proper basis on which the jury could determine the obscenity of the materials in the case at bar because of the special and integral part that the knowledge of a juror of the community from which he comes plays in deciding what conclusion the average person applying contemporary community standards would reach in a given case.



It appears from the opinion of the Supreme Court of the United States in Miller vs. California, 413 U.S. 15, 24, that the basic guidelines for the trier of the fact in an obscenity case must be

> "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, Kois v. Wisconsin, supra, at 230, quoting Roth v. United States, supra, at 489; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

The Supreme Court in Hamling v. United States, 418 U.S. 87, observed that in the Miller case, supra, the Court had abandoned the application of the national standards of obscenity because of the difficulty in formulating such uniform standards and emphasized

> "the ability of the juror to ascertain the sense of the 'average person, applying contemporary community standards' without the benefit of expert evidence, clearly indicates that 18 U.S.C. Sec. 1461 is not to be interpreted as requiring proof of the uniform national standards which were criticized in Miller." Id. 105.

In commenting on the test as stated in the Miller case, the Court in Hamling says:

> "the test was stated in terms of the understanding of 'the average person, applying contemporary community standards.' Id., at 24. When this approach is coupled with the reaffirmation in Paris Adult Theatre I v. Slaton, 413 U.S., at 56, of the rule that the prosecution need not as a matter of constitutional law produce 'expert' witnesses to testify as to the obscenity of the materials, the import of the quoted language from Miller becomes clear. A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law.

* * *

The result of the Miller cases, therefore, as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach



> in a given case. Since this case was tried in the Southern District of California, and presumably jurors from throughout that judicial district were available to serve on the panel which tried petitioners, it would be the standards of that 'community' upon which the jurors would draw." Id. 104-106.

The Court thereafter stated:

> "But this is not to say that a District Court would not be at liberty to admit evidence of standards existing in some place outside of this particular district, if it felt such evidence would assist the jurors in the resolution of the issues which they were to decide."

However, the Court in Hamling was concerned with the national standards as to which evidence had been adduced as well as the application of contemporary community standards.

Defendants argue that this Court's ruling will violate their right to change of venue. The Supreme Court has recognized the fact that different community standards would likely be applied in different communities in which cases are prosecuted. Hamling vs. United States, supra, 107. The defendants knew when they distributed the material involved in Iowa that the Government could prosecute for allegedly obscene matter in the area of distribution,

and the defendants, in making distribution of the material in Iowa, assumed the risk of prosecution and trial in that State under its contemporay community standards as to obscenity.

The fact the Government is authorized to seek an Indictment in either California or Iowa, 18 U.S.C. Sec. 3237, should not affect its right to subject the defendants' material to the community standards of Iowa and this right should not be defeated by a transfer of the case to a jurisdiction where, under the decisions of the Supreme Court, the fact finder is not in a position to determine the Iowa standards.

The general rule requires that on change of venue in a civil case the law of the jurisdiction of the transferor Court is to be applied at trial by the court in the transferee District. The universal application of Federal statutes throughout the country creates a novel problem in the instant case by reason of the statutory right of the Government to prosecute the case in the District of distribution of the allegedly obscene material, the rulings of the Supreme Court that the finder of the fact must apply his or her knowledge of the community standards of the community in which he or she resides, and the lack of knowledge of the transferee fact finder as to the requisite community standards of the transferor District which must be applied.



The Government suggests it might prove the Iowa community standards by expert witnesses but although such testimony might be of assistance to a jury in this District it could not be a substitute for or eliminate the need for the knowledge of each juror which he or she would have drawn from the community of his residence as to the applicable community standards.

The Court concludes that a jury selected from the residents of this District could not determine the contemporary community standards of the Northern District of Iowa by reason of its members not possessing the knowledge of a juror in Iowa of the community standards in which the Iowa juror resides, necessary in deciding what conclusion the average person, applying the contemporary community standards of Iowa, would reach based on the facts adduced in the instant case. There are a number of similar criminal cases now pending in this District by reason of orders transferring them from District Courts in other States on motions for change of venue like that in the instant matter. This Court concludes that it was not the intention of the Supreme Court or Congress, as indicated by the current case and statutory law, that a District Court Judge or jury in the Central District of California should decide the standards of obscenity to be deemed the contemporary community standards of any and all States in the Union from which these cases may be transferred on motions for change of venue resulting

from the fact that the allegedly obscene material was made or published in this District.

On its own motion, the Court orders that, for the reasons stated above, the Indictment pending herein is hereby dismissed.

DATED: May 22, 1975.

E. AVERY CRARY
United States District Judge



APPENDIX C

RULING OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, MONROE DIVISION
AUGUST 6, 1975

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

CRIMINAL DOCKET
NO. 75-273

UNITED STATES OF AMERICA

versus

PAUL DAVID NOVICK, ALAN HAIM AND
UNIQUE SPECIALTIES, INC.

BEN C. DAWKINS, JR., SENIOR JUDGE.

RULING ON DEFENDANT NOVICK'S MOTION FOR CHANGE OF VENUE

In light of the ruling in United States of America vs. Robert Elkins, No. Cr. 74-1828 (C.D. Cal., May 23, 1975

(Crary, J.), rendered by the United States District Court for that District, and the authorities therein cited, the motion by defendant Paul David Novick for change of venue hereby is DENIED.

THUS DONE AND SIGNED, in Chambers, at Shreveport, Louisiana, this 6th day of August, 1975.

/s/ Ben C. Dawkins Jr.
BEN C. DAWKINS, JR.
SENIOR UNITED STATES
DISTRICT JUDGE



APPENDIX D

RULING OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, MONROE DIVISION
AUGUST 11, 1975

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA

MONROE DIVISION

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CRIMINAL DOCKET
NO. 75-273

UNITED STATES OF AMERICA

versus

PAUL DAVID NOVICK, ALAN HAIM AND
UNIQUE SPECIALTIES, INC.

---

BEN C. DAWKINS, JR., SENIOR JUDGE.

RULING ON DEFENDANT HAIM'S
MOTION FOR CHANGE OF VENUE

In light of the ruling in United States of America vs. Robert Elkins, No. Cr. 74-1828 (D.C. Cal., May 23, 1975), (Crary, J.), rendered by the United States District Court for that District,

and the authorities therein cited, the motion by defendant Alan Haim for change of venue hereby is DENIED.

THUS DONE AND SIGNED, in Chambers at Shreveport, Louisiana, this 11th day of August, 1975.

/s/ Ben C. Dawkins Jr.
BEN C. DAWKINS, JR.
SENIOR UNITED STATES
DISTRICT JUDGE

CERTIFICATE OF SERVICE

I, Roger Jon Diamond, declare as follows: I am an attorney at law duly admitted to practice before the Supreme Court of the United States and I am the attorney for petitioners.

On 8/25 1975, pursuant to Rule 33 of the Supreme Court Rules, I caused the within MOTION FOR LEAVE TO FILE PETITION FOR WRITS OF MANDATE AND PROHIBITION and PETITION FOR WRITS OF MANDATE AND PROHIBITION on all respondents by placing three copies thereof enclosed in a sealed envelope with first class postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States District
Court, Western District of
Louisiana
3B12 Federal Building
500 Fannin Street
Shreveport, Louisiana 71161

The Honorable Ben C. Dawkins, Jr.
Senior United States District Judge
Federal Building
500 Fannin Street
Shreveport, Louisiana 71161

Donald E. Walter,
United States Attorney
J. Ransdell Keene, Assistant
United States Attorney
2D01 Federal Building
500 Fannin Street
Shreveport, Louisiana 71161

I further certify that all parties required to be served have been served.

Roger Jon Diamond

Roger Jon Diamond
15415 Sunset Boulevard
Pacific Palisades, CA 90272

Supreme Court, U. S.
FILED
OCT 14 1975

No. 75-300

# In the Supreme Court of the United States

OCTOBER TERM, 1975

PAUL DAVID NOVICK, ET AL., PETITIONERS

*v.*

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, BEN C. DAWKINS, JR., SENIOR JUDGE, AND UNITED STATES OF AMERICA

*ON MOTION FOR LEAVE TO FILE PETITION FOR WRITS OF MANDAMUS AND PROHIBITION*
*AND*
*PETITION FOR WRITS OF MANDAMUS AND PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA*

## MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

**ROBERT H. BORK,**
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

# In the Supreme Court of the United States

OCTOBER TERM, 1975

---

No. 75-300

PAUL DAVID NOVICK, ET AL., PETITIONERS

*v.*

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, BEN C. DAWKINS, JR., SENIOR JUDGE, AND UNITED STATES OF AMERICA

---

*ON MOTION FOR LEAVE TO FILE PETITION FOR WRITS OF MANDAMUS AND PROHIBITION*
*AND*
*PETITION FOR WRITS OF MANDAMUS AND PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA*

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**MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION**

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Petitioners seek writs of mandamus and prohibition requiring a change in the venues of their scheduled trial.

A six-count indictment filed on June 19, 1975, in the United States District Court for the Western District of Louisiana charged petitioners with having violated 18 U.S.C. 1461 by mailing obscene matter from Los Angeles, California, to Shreveport, Louisiana. Prior to



594-920—75——1

trial, petitioners moved to have their case transferred to the Central District of California on the grounds (1) that they and their witnesses reside in California and cannot bear the expense of a lawsuit in Louisiana, and (2) that the community standards by which petitioners' conduct must be judged are those of the Central District of California (where the mailings originated and petitioners are domiciled) and not the Western District of Louisiana, a jurisdiction with which petitioners have no familiarity.

In opposing the change of venue, the government noted that its witnesses are largely from Louisiana, that financial problems incurred by petitioners could be alleviated by proceeding *in forma pauperis,* and that a transfer to the Central District of California would effectively terminate the prosecution. In support of the last contention, the government pointed to the ruling of the United States District Court for the Central District of California in *United States* v. *Elkins,* 396 F. Supp. 314 (Pet. App. B). In *Elkins,* which involved a similar prosecution for mailing obscene matter from California to Iowa, the District Court for the Central District of California had dismissed the indictment (after a change of venue from Iowa to California), holding that the contemporary community standards of the Northern District of Iowa were the standards applicable to the issue of the obscenity of the materials in question; that expert testimony concerning those standards would not be adequate to prove the Iowa community standards; and that jurors from the Central District of California



were not qualified to ascertain and apply the contemporary community standards of Iowa on the basis of evidence adduced at a trial in California.

On August 6 and 11, 1975, petitioners' motions for a change of venue from Louisiana to California were denied (Pet. Apps. C, D). The petition filed with this Court for a writ of mandamus or prohibition arises from the denial of relief by the District Court for the Western District of Louisiana.

Petitioners' claim that they are entitled to the issuance of an extraordinary writ is without merit. The circumstances described in their petition are not exceptional, and they have failed to establish that the district court abused its descretion in denying their motions for a change of venue. See Rule 21, Fed. R. Crim. P.; *LaBuy* v. *Howes Leather Co.,* 352 U.S. 249, 257. The correctness of the district court's ruling in this case will be subject to review in the event of a conviction. Petitioners present no compelling reasons for avoiding the regular, orderly course of appellate review by resorting to the All Writs Statute. See *Will* v. *United States,* 389 U.S. 90, 98; *Parr* v. *United States,* 351 U.S. 513, 520–521; see also *Ex parte Fahey,* 332 U.S. 258, 259–260.

Petitioners' explanation for seeking direct review by this Court of the district court's ruling, rather than challenging the denial of their motions for a change of venue in the Court of Appeals for the Fifth Circuit, is that they are in effect attacking the ruling of a district court in the Central District of California in *Elkins* and that the Fifth Circuit has no

power to overturn the decision of a lower court not within its jurisdiction (Pet. 21–23). That explanation is not persuasive. Petitioners were not parties to the litigation in *Elkins,* and have no standing to seek review of rulings made in that litigation.[1] Their claim for relief arises from the decision of a district court in the Western District of Louisiana. That ruling is subject to review by the Fifth Circuit through the customary appellate process following conviction. No exigencies exist that entitle petitioners to avoid the normal intermediate appellate process and seek relief in this Court by way of prohibition or mandamus. Cf. *Platt* v. *Minnesota Mining Co.,* 376 U.S. 240; *Jones* v. *Gasch,* 404 F.2d 1231 (C.A. D.C.).

For the foregoing reasons, it is respectfully submitted that the motion for leave to file a petition for writs of mandamus and prohibition and the petition for writs of mandamus and prohibition should be denied.

ROBERT H. BORK,
*Solicitor General.*

OCTOBER 1975.

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[1] Petitioners have pointed out in a letter to the Court, dated October 6, 1975, that the defendants in the original *Elkins* case were reindicted in the United States District Court for the Northern District of Iowa, following dismissal of the earlier indictment in the Central District of California, and that on October 1, 1975, the District Court for the Northern District of Iowa again ordered the case transferred from Iowa to California. For the reasons stated above, we do not believe that these developments justify granting the petition for a writ of mandamus or prohibition filed by petitioners in this case.

U.S. GOVERNMENT PRINTING OFFICE 1975